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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. These decisions will appear in the January/February issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Interim Relief – *Prima Facie* Motion – Sector Determination – The applicants, owners and developers of a natural gas fired steam powered electricity generating station (the "Project"), applied for a sector determination, submitting the work at the project should fall within the electrical power systems ("EPS") sector – The applicants were bound by several ICI provincial agreements - The applicants directly hired tradespeople, as opposed to engaging a general contractor, and applied the wage and benefit provisions of the applicable ICI agreements to the workers – However, the applicants maintained the Project was in the EPS sector and, therefore, they were not bound by those ICI provincial agreements (but applied them by choice) – Unions had filed grievances under their ICI agreements that were adjourned pending the sector determination – The Sarnia Construction Association and others moved for an interim order directing the applicants be bound by those agreements – The Board dismissed the motion on the basis that the applicants demonstrated the balance of convenience did not favour granting the order, since having the grievance referrals proceed on an interim basis might result in orders being made against the applicants which would have to be reversed if they were successful in obtaining the sector determination they were seeking, as well as the fact the *status quo* of the work at the Project was that the work at the Project was *not* in the ICI sector – Multiple responding parties and intervenors moved to have the Board make a summary determination of the sector issue on the grounds that the Board's 2008 *Barclay* decision had already decided that same issue and there was no material difference between the Project and the *Barclay* project – The Board concluded the distinctions and differences on which the applicants relied to contend the Project was in the EPS sector were not so materially different to warrant the Board making the determination the applicants sought – Of particular note in coming to that decision was the Board's conclusion that in assessing bargaining patterns the focus ought to be on the bargaining patterns that have developed in connection with the construction of similar projects in the Province, rather than on assessing the bargaining patterns being used by a particular employer – The Board pointed to the potential utility of the *Act*'s project agreement provisions, which allow for the parties to negotiate and enter into an agreement varying the provincial collective agreements, as the applicants asserted the provincial agreements were not suitable to their objectives and methods for the construction of the Project – The decision also affirmed the importance of following earlier Board decisions (unless they are clearly wrong) in order to maintain stability and certainty in the construction industry – Interim order motion dismissed; Summary determination motion granted

EASTERN POWER LIMITED; RE: LIUNA, Local 1089 et al; OLRB File No. 2030-13-M;

Dated February 12, 2014; Panel: Harry Freedman (19 pages)

Construction Industry Grievance – Evidence – Witness – The parties called evidence and argued a preliminary issue regarding the authenticity and admissibility of certain documents relied upon by the Union, specifically photocopies of alleged time sheets –Prior to issuance of a decision on the merits, counsel for Limen delivered to the Board a sworn statement of G – Limen sought leave to call evidence through G consistent with his statement, and the Board agreed to reopen the evidence – Limen argued it should be permitted to recall L, who previously testified for Limen under summons, for the purpose of having a *Browne v Dunn* caution put to him with respect to the evidence given by G – The Board sympathized with the Union's submission that recalling L would further delay the proceedings, however it ultimately held L ought to have an opportunity to address the inconsistent assertions made by G, which severely undermined the substance of L's prior testimony – The Board noted the atypical nature of the grievance, stating "[i]t is a grievance that claims over $1,200,000.00 in damages from Limen that has as its foundation documents that are photocopies of originals that cannot be found and were, even on Local 2's best case, delivered surreptitiously and anonymously to its Business Manager" – The Board held it had the power to accept any evidence which it, in its discretion, considers proper, whether admissible in a court of law or not – It was the Board's view that given how much was "at stake" for Local 2 and Limen, it should ensure that all the testimony relevant to the authenticity and admissibility of the time sheets in question would be heard before a decision would be rendered - Matter proceeds

LIMEN MASONRY LIMITED; RE: The Brick and Allied Craft Union of Canada Local 2; RE: Bricklayers and Stonemasons Union Local 2 (Ontario) Employee Benefit Trust & Pension Benefit Trust; OLRB File No. 0878-09-G; Dated February 25, 2014; Panel: Lee Shouldice (11 pages)

***Public Sector Labour Relations Transition Act* – Representation Vote – Settlement** – OPSEU and Unifor entered into comprehensive Minutes of Settlement concerning representation votes and the procedures leading up to these votes – The votes were held and employees in the service bargaining unit voted in favour of OPSEU in a close vote – A day prior to the vote Unifor wrote the Board alleging that OPSEU had violated the Settlement (sending emails to employees without having them vetted by the employer and including unauthorized attachments) – Unifor reserved the right to seek all appropriate orders from the Board with respect to these violations – OPSEU had apologized for the first violation but allegedly did it again right before the vote – A month after the vote the Board issued a decision giving the parties an opportunity to respond to Unifor's submissions – OPSEU submitted that despite Unifor's request, its delay in seeking a specific order was fatal – One week later, Unifor submitted that it made its complaint in a timely fashion and, in light of OPSEU not appearing to deny the allegations, it submitted that the vote should be set aside and a new vote ordered – While the Board was concerned about the violation of the Settlement and noted that in other circumstances it may have held another representation vote, here it found that Unifor's substantial delay in requesting that remedy was fatal to its request – The Board found its delay was simply too long: where a party has a concern about the way a vote was conducted and wishes a remedy for it, it is incumbent on that party to act quickly – While Unifor raised its complaint quickly it did not seek any remedy for it – Only after the Board's decision and OPSEU's submission did Unifor act to request a remedy – Objection dismissed – Declarations made

ST. THOMAS ELGIN GENERAL HOSPITAL; RE: Ontario Public Service Employee Union, Local 152; RE: ONA; RE: St. Joseph's Health Care London; OLRB File No. 2553-12-PS; Dated February 18, 2014; Panel: Brian McLean (7 pages)

Certification – *Crown Employees Collective Bargaining Act* – PSAC sought to be certified to represent approximately 500 sergeants in the provincial adult correctional facilities and youth services managers in provincial youth centres – The preliminary issue before the Board was whether the provisions of CECBA prohibit the application – The Crown submitted that the seven bargaining units set out in CECBA occupied the entire field, and the application must fail – This position was supported and enhanced by OPSEU and AMAPCEO, with AMAPCEO also stating that if the individuals who were the subject of the application were not excluded by the LRA, then they were included in their bargaining unit – The Vice-Chair found, in reading CECBA and the LRA together that PSAC was entitled to file the application and have it heard on its merits – The

Vice-Chair noted that one of the assertions of fact made by PSAC was that the individuals who were subject to the application were not represented by either AMAPCEO or OPSEU, because the relevant union had abandoned its bargaining rights, which assertion was denied by both unions – The Vice-Chair found however that if abandonment of bargaining rights were lawful under CECBA, and PSAC is correct in its assertions, then those individuals could potentially be the subject of an application for certification – The Vice-Chair found that the responding parties had not established that CECBA precludes the filing of this application and set it down for additional hearing dates – The decision of the concurring Members of the Board agreed that the matter continue to be heard, but did not wish to preclude, after hearing all the additional evidence, that the application was prohibited – Matter continues

THE CROWN IN THE RIGHT OF ONTARIO; RE: Ontario Public Service Employees Union and the Association of Management, Administrative and Professional Crown Employees of Ontario; RE: Public Service Alliance of Canada; OLRB File No. 0119-13-R; Dated February 28, 2014; Panel: Lee Shouldice: J.A. Rundle, and D. A. Patterson (17 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – In this application for certification by the Carpenters to displace the Sheet Metal Workers, the Sheet Metal Workers asked the Board to reconsider a part of its decision directing how to deal with the remaining 100 or so status disputes – The Board did not accept that the facts for each individual who was challenged must be obtained by oral evidence and that no other process could be followed – The Board noted that its ultimate objective is a process that combines two fundamental principles: efficiency in providing results to the parties and the employees they seek to represent, while providing the basic requirements of natural justice and appropriate decision making to ensure that the parties are provided with substantive justice – The Board noted that neither objective is absolute and that they must be adjusted so that they are achieved to the greatest extent that is reasonably possible – The Board referred to the Supreme Court of Canada case (*Hryniak v. Mauldin*) which spoke, in part, of "moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case" and noted that the objectives identified by the Supreme Court of Canada ought equally to be those of the Board – Reconsideration denied – Matter continues as directed

TRUDEL & SONS ROOFING LTD; RE: United Brotherhood of Carpenters and Joiners of America, Local 27; RE: Sheet Metal Workers' International Association, Local 51; OLRB File No. 3209-12-R; Dated February 21, 2014; Panel: David McKee (4 pages)

COURT PROCEEDINGS

Certification - Judicial Review – Termination – Timeliness – The Painters' certification application was filed on the day it lost a representation vote in a termination application but before the Board had issued its decision – The Board exercised its discretion under s. 111(3)(b) of the *Labour Relations Act* and postponed consideration of the Painters' application until a "final decision" issued on the pending termination application – The Labourers argued that the Board did not have the jurisdiction to hear the Painters' certification application because it was not timely – The appropriate standard of review is reasonableness because this involved statutory interpretation within a highly specialized labour context which is "emblematic of the need for judicial deference" – On the issue of timeliness, the Labourers argued that the Board cannot change the time periods for certification applications because it would promote uncertainty and prejudice – The Court disagreed and held that the Board's use of s. 111(3) was "reasonable and entirely consistent with the language and the purposes of legislation" – Further, the Board carefully considered the interpretation to be given to s. 111(3) and was alive to all these considerations – Application dismissed.

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICAL, LOCAL 1059; RE: International Union of Painters and Allied Trades; 2014 ONSC 755 (Court File No. 181/13); OLRB File No. 1307-10-R; Dated January 30, 2014; Panel: Kent, Sachs and Harvison Young JJ. (6 pages).

Certification – Construction Industry - Judicial Review – Nadalin sought judicial review of the Board's determination that two of its employees were performing construction industry work on the application date – Nadalin submitted the Board's decision that work involving diagnosing

the reasons why a pump was not working, tagging the pump wires and locking out the power source so the pump could be removed and repaired off-site, was repair work undertaken at the construction "site" – The Board reasoned that preparation for the pump's removal carried out at the construction site was part of the overall process for carrying out the repair work – The Court held this aspect of the Board's decision was unreasonable, as the Board's interpretation effectively rewrote the construction industry definition so that the term "at the site" only applied to the initial location of any type of equipment repaired, regardless of where and by whom the substantive repair work was actually done – Nadalin also submitted the Board's decision that work involving replacing a thermal sensor on a heater constituted repair work was unreasonable – The Court upheld this portion of the Board's decision, as it fell within the range of possible, acceptable outcomes and, therefore, was reasonable – As the Board's decision with respect to the heat sensor was upheld, the two employees engaged in some construction work on the application date and the Board's decision certifying the Union was upheld – Application dismissed

NADALIN ELECTRIC COMPANY (ONTARIO) INC.; RE: Ontario Labour Relations Board; RE: International Brotherhood of Electrical Workers Local 105; OLRB File No. 0165-13-R; (Court File No. DC-13-0498JRDC); Dated February 28, 2014; Panel: Marrocco, Whitaker and Ellies J.J. (5 pages)

Duty of Fair Representation – Judicial Review - Natural Justice – Tsoi sought judicial review of the Board's decision holding the Union did not breach its duty of fair representation owed to him – Tsoi asserted he was denied natural justice and procedural fairness because, in the course of the consultation process, the Board permitted a brief recess before the Union answered a question posed by the adjudicator, and the Union's answer raised facts that had not been pleaded – The Court noted the proceeding at issue was a consultation, which is a process that is meant to be less formal than an arbitration, a process in which adjudicators lead the proceeding and frequently ask questions, and a process in which the giving of evidence under oath and cross-examination of witnesses is not typically a feature – The Court held there was nothing unfair or improper about the recess, noting the brief recess did not interrupt or involve the presentation of evidence by a sworn witness – Further, it stated that in consultations parties are not precluded from making submissions not based on facts set out in their pleadings, and that "[t]he Board's rules allow for the Board to receive evidence whether it has been pleaded or not" – As Tsoi did not object at the time, the Court held the Board could not be faulted for failing to explain why it received information when no objection was made – Finally, the Court held the Board acted reasonably in concluding there was no violation of section 74 of the *Labour Relations Act* – Application dismissed

ALBERT TSOI; RE: Ontario Labour Relations Board; RE: Unite Here, Local 75, Hilton Toronto; OLRB File No. 3908-09-U; (Court File No. 330/12); Dated February 19, 2014; Panel: Lederman, Sachs and Daley JJ. (4 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
LIUNA – Rudyard Swaby; Zzen Divisional Court No. 485/13	0318-13-R	Pending
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	June 26, 2014
DH General Contracting Inc. Divisional Court No. 13-DV-1966 **(Ottawa)**	1820-12-R 3025-12-G	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Nadalin Electric Company (Ontario) Inc. Divisional Court No. 498/13 **(Hamilton)**	0615-13-R	Dismissed; February 28, 2014
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Abandoned; February 4, 2014
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	Seeking Leave to Appeal CA
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Motion for Leave to CA; Dismissed; Feb 21, 2014
Durval Terciera, et al Court of Appeal No. C58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	March 11, 2014
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Dismissed; February 19, 2014

IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	March 26, 2014
EllisDon Corporation Court of Appeal	0784-05-G	Pending CA
SMW v. EllisDon Court of Appeal		Pending CA
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 M43026	2692-06-ES	Dismissed; Seeking Leave to CA
Landmart Building Corp. Divisional Court No. DC 12-346JR **(Hamilton)**	2519-11-R	Abandoned
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above